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## Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge

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## Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge

### Cover Page Footnote

President, Board of Directors, National American Indian Court Judges Association (NAICJA); Past Director and Clinical Professor of Law, University of Colorado School of Law American Indian Law Clinic. Thank you to the NAICJA Board of Directors and Steering Committee, especially the Honorable Carrie Garrow, Mark Pouley, and Joseph Wiseman, for their invaluable insights and support in the writing of this article. Special appreciation is given to Mashantucket Pequot Tribal Court judicial law clerk Latanya Gabaldon for her editorial assistance.

# DEFINING THE INDIAN CIVIL RIGHTS ACT’S “SUFFICIENTLY TRAINED” TRIBAL COURT JUDGE

Jill Elizabeth Tompkins\*

*Modern tribal courts are faced with the difficult proposition of resolving increasingly complex disputes in a manner that is both loyal to tradition, and responsive to Anglo notions of due process. Tribal courts . . . are in a unique position to rediscover tribal customs and traditions as a manner of resolving disputes and reintegrating those values into modern Indian life. The resolution of a dispute in tribal court, however, must always be administered with a dose of Anglo due process . . . .*<sup>1</sup>

Honorable B.J. Jones  
Chief Justice, Turtle Mountain Court of Appeals

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## INTRODUCTION

Tribal justice systems are one of the most visible manifestations of the exercise of tribal sovereignty. Diminution of tribal court criminal jurisdiction by the U.S. Supreme Court is the trend that has most undermined American Indian and Alaska

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<sup>1</sup> B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-state and Tribal-federal Court Relations*, 457 WM. MITCHELL L. REV. 457, 475 (1998).

Native tribes' ability to protect their citizens and communities. In 1968, with the passage of the Indian Civil Rights Act (ICRA),<sup>2</sup> tribal courts were divested of authority to hand down felony sentences, essentially stripping the tribes of meaningful jurisdiction over serious offenders. With the Supreme Court's ruling in *Oliphant v. Suquamish Tribe*, tribal courts were deemed to lack jurisdiction over non-Indians charged with committing criminal offenses within tribal lands.<sup>3</sup> Fortunately, in recent years, Congress has been more attentive to the alarms raised by tribal leaders regarding the rates and nature of the violent crimes occurring in Indian Country by Indians and non-Indians alike, and has taken action to restore a limited amount of tribal court jurisdiction and sentencing authority.

The Tribal Law and Order Act of 2010 (TLOA) is one example of Congress' response<sup>4</sup>. It amended the ICRA to allow tribal courts to sentence offenders up to three years for any one offense and up to nine years in any single proceeding.<sup>5</sup> However, this new sentencing authority came with certain strings attached—ostensibly put into place to ensure that defendants charged in tribal court receive due process. With the enactment of the Violence Against Women Act Reauthorization of 2013 (VAWA), Title IX, "Safety For Indian Women,"<sup>6</sup> Congress took additional steps to address violence in Indian Country. These steps especially focused on the epidemic of sexual and domestic violence committed by non-Indians against American Indian women. VAWA 2013 restores to tribes the ability to prosecute non-Indians who commit crimes of sexual and domestic violence in Indian Country. This restored jurisdiction is referred to in VAWA 2013 as "Special Domestic Violence Criminal Jurisdiction" (SDVCJ). Pursuant to VAWA 2013, for the first time since the *Oliphant* decision, tribes will again be able to prosecute non-Indians, but for only three categories of crime: domestic violence, dating violence, and

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<sup>2</sup> Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 and 25 U.S.C.).

<sup>3</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978) (concluding that Indian tribes do not have inherent jurisdiction to try and punish non-Indians).

<sup>4</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

<sup>5</sup> 25 U.S.C. §§ 1302 (a)(7)(B), (C), (D) (2010).

<sup>6</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1101(a), 127 Stat. 134 (2013).

violations of protection orders.<sup>7</sup> Certain prerequisites must be satisfied in order for the tribal court to exercise this jurisdiction: 1) one of the parties in the case must be Indian; and 2) the defendant must have sufficient ties to the Indian community through residence, employment, or a relationship with a tribal member, or Indian resident.<sup>8</sup> If tribes wish to exercise the expanded SDVCJ however, the TLOA's Due Process requirements attach. In order to restore tribal criminal authority, Congress adopted a compromise that would allay non-Indian concerns regarding the fairness of tribal court proceedings balanced against the tribes' competing desire to preserve the cultural integrity of their justice systems.

This Article explores the meaning of ICRA's new provisions which require tribes choosing to exercise jurisdiction in criminal matters with either TLOA's enhanced sentencing authority or VAWA's SDVCJ to utilize judges that are "licensed by any jurisdiction in the United States"<sup>9</sup> and have "sufficient legal training to preside over criminal trials."<sup>10</sup> Part I discusses the historical criticism levied against tribal courts which gave rise to the imposition of ICRA's tribal judicial qualifications as a jurisdictional prerequisite. Next, Part II explores the tension tribal courts experience as they seek to operate systems committed to traditional cultural values, which will be able to withstand federal court scrutiny. Finally, Part III offers recommendations for tribes to help them satisfy ICRA's judicial qualification requirements. Although Congress has mandated tribal judicial qualifications as a precursor to the exercise of SDVCJ and the imposition of TLOA's enhanced sentencing authority, it allowed significant leeway for tribal courts to develop their own approaches to satisfying the requirements.

#### I. DUE PROCESS CONCERNS ABOUT TRIBAL COURTS

"Why Would Anyone Oppose the Violence Against Women Act?" is the question Molly Ball, a reporter for *The Atlantic*, set out to answer after 22 Republican senators voted against

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 25 U.S.C. § 1302(c)(3)(B).

<sup>10</sup> *Id.* § 1302(c)(3)(A).

reauthorizing VAWA in February 2013.<sup>11</sup> Among the reasons these dissenters took such a “politically risky stand” was their opposition to the provision that would give tribal governments criminal jurisdiction over non-Indians who commit crimes on reservations.<sup>12</sup> These critics “say tribal courts are under resourced and have a history of failing to provide legal protections to defendants.”<sup>13</sup>

The chronic inadequacy of tribal court funding has been known for decades.<sup>14</sup> For example, in 1942, the Commissioner of Indian Affairs, while noting the phenomenal progress of tribal courts, identified underfunding as a lingering problem: “[t]he lack of adequate appropriations for the support of courts and for the maintenance of an adequate police force have handicapped the administration of justice.”<sup>15</sup> About a half-century later, the U.S. Commission on Civil Rights examined enforcement of the ICRA starting in 1986 and issued its report in 1991. One of the Commission’s key findings at that time was that “[t]he failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirements of the Indian Civil Rights Act of 1968, has continued for more than 20 years.”<sup>16</sup> This is still the case, as evidenced by the recent Government Accounting Office survey of tribes. In 2012, the GAO conducted a survey of 171 tribes regarding their plans to implement TLOA’s new sentencing authority.<sup>17</sup> 109 of 171 tribes responded, and none of the 109 tribes

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<sup>11</sup> Molly Ball, *Why Would Anyone Oppose the Violence Against Women Act?*, THE ATLANTIC, Feb. 12, 2013, available at <http://www.theatlantic.com/politics/archive/2013/02/why-would-anyone-oppose-the-violence-against-women-act/273103/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Robyn Shapiro, *Report to the House of Delegates*, 117A A.B.A. SEC. INDIVIDUAL RTS. AND RESPONSIBILITIES REP. 4, <http://www.americanbar.org/content/dam/aba/migrated/jd/tribalcourts/pdf/OneHundredSeventeenA.authcheckdam.pdf>.

<sup>15</sup> U.S. COMM’N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 41 (1991) (citing JOHN COLLIER, 1941 REPORT OF COMMISSIONER OF INDIAN AFFAIRS).

<sup>16</sup> *Id.* at 72.

<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF

were exercising TLOA's enhanced sentencing authority at the time.<sup>18</sup> When asked to describe challenges to exercising the new jurisdiction, 96 percent of the responding tribes cited lack of funding as the most common barrier.<sup>19</sup> Additionally, several tribes reported specific challenges with the cost of hiring a licensed, law-trained judge.<sup>20</sup>

Unfortunately, a national picture of tribal court funding situations does not exist. Tribal justice systems can be funded through the federal Bureau of Indian Affairs funds, Department of Justice grants, and/or tribal sources, including proceeds from Indian gaming and other tribal economic ventures. The forthcoming Bureau of Justice Statistics 2014 National Tribal Court Survey<sup>21</sup> will hopefully go a long way to finally providing information about tribal court funding trends and documenting their unmet need. It is anticipated that the survey will reveal that the root reason tribes are hesitant to exercise the expanded sentencing authority under TLOA and the new SDVCJ jurisdiction under VAWA is lack of funding for tribal court operations and detention facilities.

Fierce criticism of tribal courts is not a recent phenomenon. Often the critic will paint all tribal justice systems with the same broad brush based on a single questionable ruling or practice of a single tribal court. Tribal courts have been scrutinized by members of Congress and by the federal courts. For example, in his dissent in *Burlington Northern R. Co. v. Red Wolf*, Circuit Judge Kleinfeld detailed at length the numerous due process defects he perceived in a wrongful death jury trial conducted by the Crow Tribal Court.<sup>22</sup>

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JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY OF CERTAIN GRANT FUNDS 2 (2012), available at <http://gao.gov/assets/600/591213.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.*

<sup>21</sup> Kauffman & Associates, Inc., *2014 National Tribal Court Survey of Tribal Court Systems*, <http://www.tribalcourtsurvey.org/survey/>.

<sup>22</sup> *Burlington Northern R. Co. v. Red Wolf*, 106 F.3d 868, 872 (9th Cir. 1997), (citing due process violations including the impaneling of a jury where a majority of the jurors were related to the decedents, improper prejudicial comments by a tribal appellate court judge to the jury venire prior to being impanelled, the use of evidence that would have been barred under federal rules, and the barring of evidence relating to the proper amount of compensatory damages.), *vacated* *Burlington Northern R. Co. v. Estate of Red Wolf*, 522 U.S. 801 (1997).

At about the same time, Congressman Henry Hyde, in 1996, spoke on the floor of the House of Representatives repeating Judge Kleinfeld's Due Process complaints about the Crow trial proceedings.<sup>23</sup> His closing remarks foreshadowed the imposition of the due process requirements mandated in TLOA and VAWA:

I do want to stress that I believe in the Indian tribal court system. It is only right that Indians should be able to have their own courts to judge their own affairs. By the same token, I want to say emphatically that it is only right that those courts should provide all of the constitutional protections required by law, including basic due process. The consistent enforcement of constitutional norms is particularly important if the tribal courts are to have jurisdiction over nonmembers who have only tangential relationships with the tribes.<sup>24</sup>

More recently, Senators Jon Kyl, Orrin Hatch, and Tom Coburn wrote a "Minority View" report objecting to the provision of VAWA 2013 that establishes tribal criminal jurisdiction over non-Indian offenders.<sup>25</sup> Their criticism was only supported by anecdotes regarding a few isolated tribal court systems.<sup>26</sup> Among their complaints was the criticism that tribal courts are "racially-exclusive"<sup>27</sup>—without, of course, acknowledging that it was the U.S. Supreme Court that created the situation with its *Oliphant* decision.

In *Oliphant*, Chief Justice Rehnquist approvingly cites the reasoning of *Ex parte Crow Dog*.<sup>28</sup> In *Ex parte Crow Dog*, the Court confronted the issue of whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land.<sup>29</sup> In concluding that criminal jurisdiction was exclusively in the tribe,

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<sup>23</sup> 142 CONG. REC. E1704 (daily ed. Sept. 26, 1996) (statement of Rep. Henry J. Hyde), <https://www.congress.gov/congressional-record/1996/9/26/daily-digest>.

<sup>24</sup> *Id.*

<sup>25</sup> S. REP. NO. 112-153, at 48–56 (2011).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (citing *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

<sup>29</sup> *Id.* at 210.



the *Crow Dog* court found “particular guidance in the ‘nature and circumstances of the case.’”<sup>30</sup>

The United States was seeking to extend United States “law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them. . . . It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .”<sup>31</sup>

Applying this reasoning to the inverse situation concerning a non-Indian offender, the *Oliphant* court declined to adopt the position that tribes retain the power to try non-Indians according to their own customs and procedures.<sup>32</sup> Rather, the Court held that tribes did not have inherent jurisdiction to try and punish non-Indian offenders.<sup>33</sup>

Senators Kyl, Hatch, and Coburn cite an Indian newspaper publisher, who without documentary support, asserted that, “[i]n most tribal constitutions there is no separation of powers.”<sup>34</sup> Professor Frank Pommersheim articulated the importance of separation of powers for the legitimacy of tribal courts: “majoritarian politics . . . cannot achieve legitimacy for all segments of society or tribe. The legal system . . . ha[s] often been able to establish the rights of individuals or groups to be treated fairly under the law.”<sup>35</sup> In order for a tribal court to protect the rights of individuals it needs to be able to operate without political interference from other tribal governmental branches. What these critics fail to acknowledge, however, is that with the passage of the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 210–11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 212.

<sup>34</sup> S. REP. NO. 112-153, at 49 (2011).

<sup>35</sup> FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 72–73 (1995).

Indian Reorganization Act of 1934<sup>36</sup> tribes were encouraged to adopt cookie-cutter constitutions that did not provide for independent tribal judiciaries. A review of more recently adopted or revised tribal constitutions, however, reveals an emerging trend towards the establishment of constitutionally separate tribal courts.<sup>37</sup>

Although VAWA 2013's tribal court jurisdictional provisions are directed solely to criminal prosecutions, these opposing Senators took the opportunity to rail against the principle of tribal sovereign immunity and leaped to the following conclusion: "[t]his lack of civil-rights guarantees and avenues for their meaningful enforcement has resulted in tribal criminal-justice systems that fail to provide Due Process."<sup>38</sup> Finally, they proffered a solution to the lack of prosecution of non-Indian offenders on Indian reservations:

[A]n obvious solution to the problem of gaps in criminal jurisdiction over non-Indians on reservations in cases where the United States declines to prosecute an offense committed on a reservation by a non-Indian, [is that] *state* authorities should be allowed to do so, regardless of the race of the victim . . . . [T]he notion of sovereign "tribal territory" that is immune from the reach of state law is more legal fiction than government reality . . . . There is no good reason to not give states and their local governments jurisdiction to prosecute offenses committed by non-Indians within Indian reservations.<sup>39</sup>

These Senators are unaware that their idea is far from novel. Public Law 280 (PL 280), passed during the "Termination Era"—

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<sup>36</sup> 25 U.S.C.A §§ 461–494 (west 2015).

<sup>37</sup> JOSEPH THOMAS FLIES-AWAY, CARRIE GARROW, & MIRIAM JORGENSEN, *NATIVE NATION COURTS: KEY PLAYERS IN NATION REBUILDING*, IN *REBUILDING NATIVE NATIONS, STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 377–78 (2nd ed. 2010) ("If the nation does not have a constitutional separation of powers or a set of institutions or processes that promote independent dispute resolution outside of the written constitution, it probably ought to pursue judicial independence through constitutional reform . . . . In the past few years, more tribal nations are engaging in constitutional reform activities, which often include discussion and popular vote on separation of powers.").

<sup>38</sup> *Id.* at 50.

<sup>39</sup> *Id.* at 52 (emphasis added).

between 1953 and 1968—, extended state criminal jurisdiction to Indian Country in several states.<sup>40</sup> Steven Pevar, author and Senior Staff Counsel for the American Civil Liberties Union, offers that one major reason for the high rate of crime in Indian Country is that many of the officials responsible for prosecuting reservation crime—federal officials in non-PL 280 states and state officials in PL 280 states—“have largely abdicated those responsibilities. In PL 280 states, the counties in which Indian reservations are located are often reluctant to spend their limited tax dollars on fighting reservation crime.”<sup>41</sup> Consequently, the extension of state criminal jurisdiction to offenses committed by non-Indians within Indian reservations, via a PL 280 type fix, not only flies in the face of the principle of tribal sovereignty, but has already proven to be dangerously ineffective.

Certainly, there are some tribal courts that have employed methods that do not comport with general American notions of Due Process. A wider review of tribal court systems, however, reveals a major following of tribal constitutions and laws that incorporate at a minimum the requirements of the ICRA.<sup>42</sup> Moreover, many tribes have adopted constitutions that guarantee most, if not all, of the protections enjoyed under the U.S. Constitution.<sup>43</sup> Regardless of the current state of tribal constitutions, tribes that wish to exercise the expanded jurisdiction under TLOA and VAWA, must, nonetheless, satisfy the new requirements of Due Process as articulated in those statutes.

## II. THE TRIBAL JUDGE REQUIREMENTS

When a tribe seeks to exercise the expanded jurisdiction and enhanced sentencing authority of TLOA or VAWA 2013’s SDVCJ, and the defendant is subject to the possibility of imprisonment, the tribe must provide the following enumerated Due Process protections: 1) effective assistance of counsel equal to

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<sup>40</sup> Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18 U.S.C. and 25 U.S.C. §1360).

<sup>41</sup> STEPHEN PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 131 (4th ed. 2012).

<sup>42</sup> See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meaning of Family*, 79 NEB. L. REV. 557 (2000).

<sup>43</sup> *Id.* at 590 (“[C]ertain tribes [have] adopted a separation of powers ideology, either de jure or de facto, and their courts have exercised the power of judicial review.”).

at least that guaranteed by the U.S. Constitution; 2) in the case of a indigent defendant, a defense attorney licensed to practice by any jurisdiction in the United States, provided, at the tribal government's expense; 3) an assurance that the defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; 4) that judges presiding over criminal proceedings subject to enhanced sentencing or concerning a non-Indian defendant have "sufficient legal training to preside over criminal trials;" and 5) that any judge presiding over criminal proceedings subject to enhanced sentencing or concerning a non-Indian defendant is licensed to practice law by any jurisdiction in the United States.<sup>44</sup>

In contrast to these Congressional efforts to "Westernize" tribal courts, in the last twenty-years or so, many American Indian and Alaska Native tribes have begun questioning and reevaluating their existing tribal courts. Tribal courts are seen as the product of "historical suppression,"<sup>45</sup>—ill-fitting and ineffective at addressing individual and community problems—and many tribes are reclaiming their traditional dispute resolution practices. Many tribes are deliberately including the use of tribal elders, peacemakers, and lay judges in their justice systems. These are the individuals who have deep knowledge of indigenous justice principles and are usually highly respected by the tribal community. While seeking to implement indigenous approaches, grounded in cultural values, traditions and custom, tribal courts are grappling with an increasing number of complex cases involving a multiplication of social woes and dangers. Additionally, tribal courts need to be cognizant that their decisions will be scrutinized and judged by outside jurisdictions and face the prospects of not being enforced, especially if those decisions do not comport with federal notions of Due Process.

Professor of Law and Chief Justice of the Turtle Mountain Court of Appeals B.J. Jones described the reconciliation process that is happening in tribal justice systems:

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<sup>44</sup> 25 U.S.C. §§ 1302(c), 1304(d).

<sup>45</sup> Jones, *supra* note 1, at 475.

Modern tribal courts are faced with the difficult proposition of resolving increasingly complex disputes in a manner that is both loyal to tradition, and responsive to Anglo notions of due process. Tribal courts . . . are in a unique position to rediscover tribal customs and traditions as a manner of resolving disputes and reintegrating those values into modern Indian life. The resolution of a dispute in tribal court, however, must always be administered with a dose of Anglo due process because of the need to have tribal judgments respected by outside court systems.<sup>46</sup>

Since its enactment in 1968, ICRA has provided a means for a detained criminal defendant to seek a writ of *habeas corpus* from a federal district court for alleged ICRA violations.<sup>47</sup> A very small percentage of all tribal criminal court cases are challenged in federal court under ICRA.<sup>48</sup> In 2013, Professor and Judge Carrie Garrow conducted an unprecedented survey of habeas corpus petitions filed in federal court under ICRA since 1968.<sup>49</sup> Over the course of forty-five years, only thirty cases were filed.<sup>50</sup> When the detainee is an Indian, the federal courts have been respectful of tribal sovereignty and tribal court jurisdiction.<sup>51</sup> Fifteen of the thirty petitions were dismissed for failure to exhaust tribal court remedies.<sup>52</sup> However, when a tribal government detains a non-

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<sup>46</sup> *Id.*

<sup>47</sup> 25 U.S.C. § 1303 (2015) (“The writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”).

<sup>48</sup> Carrie E. Garrow, *Habeas Corpus Petitions In Federal And Tribal Courts: A Search For Individualized Justice*, 24 WM. & MARY BILL OF RTS. J. 137 (Oct. 2015). Carrie Garrow is a Visiting Assistant Professor at Syracuse University and the Chief Appellate Judge for the St. Regis Mohawk Tribal Court.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; accord *Alvarez v. Tracy*, 773 F.3d 1011, 1021 (9th Cir. 2014) (“Requiring exhaustion of tribal remedies not only fosters mutual respect between sovereigns in a manner similar to abstention in favor of state courts . . . but also promotes tribal self-government through the development of the tribal court system . . . . Thus the tribal exhaustion doctrine implicates unique and ‘exceptional’ concerns beyond those implicated in federal-state comity cases . . . . Not only does adjudicating ICRA claims in federal court necessarily constitute an interference with tribal autonomy and self-government . . . but resolution of statutory issues under ICRA will ‘frequently depend on questions of tribal

Indian, the federal courts have found that exhaustion of tribal remedies is not required.<sup>53</sup> Five of the thirty cases involved non-Indian defendants.<sup>54</sup> As a result of the *Oliphant* decision, it is rare for non-Indians to be detained by tribal governments. Of the thirty *habeas corpus* cases reviewed by Professor Garrow, only four writs were granted.<sup>55</sup>

Congress has not articulated a standard of review for federal courts assessing tribal court convictions for alleged violations of ICRA in *habeas corpus* proceedings.<sup>56</sup> In a recent article presented to the California Tribal-State Judicial Forum, Judge Joseph J. Wiseman<sup>57</sup> and attorney Jacquelyn Larson explored what standard of review federal courts should employ.<sup>58</sup> Since ICRA's enactment in 1968, federal courts have adopted a *de novo* standard of review and have applied federal constitutional case law in their analysis.<sup>59</sup>

When a federal court reviews a state court decision in the *habeas* context, the highly deferential standard of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) is applied.<sup>60</sup> Under this standard of review, federal review of a state court decision "shall not" be granted unless the state court's factual determination was "unreasonable" or if the state proceedings resulted in a decision that involved an "unreasonable" application of "clearly established" federal law as determined by the Supreme

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tradition and custom which tribal forums may be in a better position to evaluate than federal courts.").

<sup>53</sup> Garrow, *supra* note 51, at 9.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See 25 U.S.C. § 1303 (2015).

<sup>57</sup> Chief Judge, Northern California Intertribal Court; Chief Justice, Court of Appeals, Round Valley Indian Tribes.

<sup>58</sup> Joseph J. Wiseman, *There and Back Again (Almost)*, A.B.A., Aug. 12, 2013, <http://apps.americanbar.org/litigation/committees/civil/articles/081213-there-back-again-indian-country-almost.html>.

<sup>59</sup> *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) ("The construction or interpretation of a statute [such as ICRA] is a question of law . . . reviewed *de novo*."); *see also* *Quair v. Sisco*, 359 F. Supp. 2d 948, 977–79 (E.D. Cal. 2004) (construing allegations of violations of ICRA utilizing a *de novo* standard with no legal support except for one U.S. Supreme Court case); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005) (non-*habeas* proceeding finding that ICRA imposes an "identical limitation" on tribal government action as the Fourth Amendment and utilizing predominantly Ninth Circuit precedent reasoning that the federal standard "nets the same result as an analysis under ICRA").

<sup>60</sup> 28 U.S.C. § 2254 (1996).

Court.<sup>61</sup> Wiseman and Larson concur with Garrow's finding that the vast majority of *habeas* petitions for alleged violations of ICRA are dismissed because the petitioner has not exhausted all tribal remedies.<sup>62</sup> *Habeas* review is repeatedly denied by federal courts because the "policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims."<sup>63</sup> Wiseman and Larson posit:

Yet, despite this policy [of nurturing tribal self-government] once a tribe has exhausted its power, the tribe's definitions of such important ideals as due process and equal protection will be enforced identically to the definitions already in place by the federal court circuit encompassing that tribe. If, instead, Congress put in a deferential standard similar to the AEDPA, setting Supreme Court cases as the base standard, this would allow a tribe the ability to define its own rules without putting in place lower level federal definitions, and would actually encourage tribal self-government.<sup>64</sup>

As tribal courts begin to exercise jurisdiction under 25 U.S.C. § 1302(c) and § 1304, where tribal court defendants are being provided with the services of licensed defense attorneys, it is highly likely that the number of petitions for writs of *habeas corpus* filed in federal court will increase significantly in the near future. For this reason, tribal court judges must be even more cognizant of the increased likelihood of outside federal review of their criminal proceedings.

#### A. The Licensed Tribal Judge

Let's take a closer look at the requirements TLOA and VAWA 2013 mandate for tribal judges who are responsible for exercising the enhanced sentencing authority. These judicial qualification requirements are found in each law under the heading "Rights of

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<sup>61</sup> Wiseman, *supra* note 63 (citing 28 U.S.C. § 2254(d) (1996)).

<sup>62</sup> *Id.* (citing *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010); *Alvarez v. Tracey* 773 F.3d 1011 (9th Cir. 2014)).

<sup>63</sup> *Jeffredo*, 599 F.3d.

<sup>64</sup> Wiseman, *supra* note 63, at 5.

Defendants.”<sup>65</sup> The presiding tribal court judge must be licensed to practice law and have “sufficient legal training to preside over criminal proceedings.”<sup>66</sup> In the course of the Government Accounting Office 2012 study on the implementation of TLOA, one tribe reported that it maintained a very effective civil and criminal justice system for the past forty years in spite of never having or requiring a law-trained judge to preside over the court.<sup>67</sup> When considering the Tribal Law and Order Act of 2009, the Committee on Indian Affairs received comments that tribal court judges should be required to graduate from an accredited law school and be licensed by a state supreme court.<sup>68</sup> Noting that several states do not require judges to graduate from an accredited law school, the Committee declined to recommend such qualifications.<sup>69</sup> The Committee did provide some guidance as to the licensing requirements:

The intent of the section 304 licensing requirements for public defenders and tribal court judges respects the dual purposes of the Indian Civil Rights Act to protect the rights of individuals before tribal courts, and to acknowledge and strengthen tribal self-government. Section 304 requires tribal governments that enact criminal laws subjecting offenders to more than one year imprisonment for any one offense to also require attorneys and judges presiding over such criminal trials to meet certain licensing standards. Whether the standard employed is a state, federal or tribal standard will be a decision for the tribal government. Several tribal governments have developed their own tribal law standards and others have adopted state licensing standards.<sup>70</sup>

As a result of the Committee’s guidance, Congress mandated that the presiding tribal court judge be “licensed to practice by any

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<sup>65</sup> 25 U.S.C. §§ 1302(c), 1304(d).

<sup>66</sup> 25 U.S.C. §§ 1302(c)(3), 1304(d)(1).

<sup>67</sup> U.S. GOV’T Accounting Office, *supra* note 18, at 8.

<sup>68</sup> S. REP. NO. 111-93, at 17 n.57 (2009).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



jurisdiction in the United States.”<sup>71</sup> Given the Senate Committee report’s language it is fairly clear that so long as the tribal judge meets the tribe’s licensing standard then one of the qualification prongs is met.<sup>72</sup>

### *B. The Sufficiently Trained Judge*

The requirement that the tribal court judge have “sufficient legal training to preside over criminal proceedings”<sup>73</sup> is much more ambiguous. One scholar has astutely noted that:

[S]uch an undefined standard subjects tribal judges to having their qualifications scrutinized by federal district court judges in habeas proceedings. Federal judges will often be unfamiliar with the culturally specific-values informing the tribal government’s choice to use elders or lay judges. And as professional lawyers trained in the modern American system, federal judges may recoil from the idea that nonlawyers could justly adjudicate criminal cases. Thus in striving for flexibility, Congress may have inadvertently opened the door to inflexible federal court interpretations.<sup>74</sup>

The SDVCJ became effective for all tribes on March 7, 2015—a whole two years after VAWA 2013’s enactment. Congress did however establish a Pilot Project under which certain tribes could apply to exercise SDVCJ prior to the effective date.<sup>75</sup> The Department of Justice undertook widespread tribal consultation that included opportunities for tribal judges to weigh in on how the

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<sup>71</sup> 25 U.S.C. § 1302(c)(3)(B) (2010).

<sup>72</sup> Cf. *Johnson v. Tracy*, No. CV-11001979-PHX-DGC, 2012 WL 4478801 (D. Ariz. Sept. 28, 2012) (remanding for a new trial that comports with the requirements of TLOA, where the original presiding judge was not licensed to practice law by any jurisdiction of the United States).

<sup>73</sup> 25 U.S.C. § 1302(c)(3)(A) (2010).

<sup>74</sup> Seth Fortin, Comment, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISC. 88, 106 (2013).

<sup>75</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 1101(a), 127 Stat. 134 (2013). In Section 908(a)(2): “[T]he Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants’ rights . . .” *Id.*

Department should evaluate a tribe's eligibility to participate in the Pilot Project. In May 2013, the Justice Department circulated a "framing paper" seeking input on a variety of questions.<sup>76</sup> One question posed was:

In criminal proceedings in which the tribe exercises SDVCJ and a term of imprisonment of any length is or may be imposed, the new statute requires that the judge presiding over the criminal proceeding both is licensed to practice law and has sufficient legal training to preside over criminal proceedings. How should the Justice Department evaluate whether a judge's legal training is sufficient to preside over criminal proceedings?

The National American Indian Court Judges Association gave the following response:

This is a difficult standard to articulate. No such evaluation is necessary for many county and state court judges—some of whom may not be law school graduates or attorneys. . . . [I]n state courts of general jurisdiction, a judge whose law practice prior to taking the bench focused on non-criminal matters, will be expected to expeditiously undertake self-study to become competent to hear criminal matters. . . . A certification by a nationally respected tribal judicial education organization awarded to a tribal judge after completing a course of classroom and experiential study, could be developed that could serve as *prima facie* [sic] evidence of sufficient legal training. In lieu of that, the Department should use a flexible tribal self-certification approach in which the tribe articulates what legal education and experience the judge who

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<sup>76</sup> OFFICE OF TRIBAL JUSTICE, U.S. DEP'T OF JUSTICE, APPLICATION QUESTIONNAIRE FOR THE VAWA PILOT PROJECT ON TRIBAL CRIMINAL JURISDICTION (2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-vaawa-pilot.pdf>.

will be exercising the SDVCJ jurisdiction possesses.<sup>77</sup>

The Department of Justice granted the requests of three tribes to exercise SDVCJ: the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe of Arizona, and the Tulalip Tribes of Washington.<sup>78</sup> It may be instructive to see how each of the successful applicant tribes answered the Department's question as to how the tribe would safeguard a defendant's right to a trained, licensed judge.<sup>79</sup> If the Department of Justice found the applicants' judges qualified, then that assessment may give some guidance to non-Pilot Project tribes.

To support their assertion of qualified judges, the Umatilla Tribes cited: the Umatilla Criminal Code section 3.28(D), which mirrors the language of 25 U.S.C. § 1303(c)(3); the Umatilla Court Code section 2.02(D) which requires, "[a]ny judge presiding over a criminal trial [to] be a member in good standing of any state bar and a graduate of an accredited law school"; and Chapter 4 of the Court Code, which sets out rules of judicial conduct "similar to those governing state and federal judges."<sup>80</sup> The Umatilla's current judges, William Johnson and David Gallaher (*pro tempore*) are both law school graduates, members of the Oregon bar, and have

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<sup>77</sup> Letter from Justice Jill E. Tompkins, President, Bd. of Directors, Nat'l Am. Indian Court Judges Ass'n to Deputy Att'y Gen. Sam Hirsch, Re: Consultation on Pilot Project, VAWA §§ 904 & 908 (May 23, 2013), [http://www.google.com/url?q=http://www.tribal-institute.org/download/Drug%2520Court/NAICJA%2520comments%2520re%2520Pilot%2520Project.docx&sa=U&ved=0ahUKEwiE8OiwN\\_JAhVK-2MKHYzcDVIQFggFMAA&client=internal-uds-cse&usg=AFQjCNHLjwoL2nnRGwDCxseYf0yr-OR8g](http://www.google.com/url?q=http://www.tribal-institute.org/download/Drug%2520Court/NAICJA%2520comments%2520re%2520Pilot%2520Project.docx&sa=U&ved=0ahUKEwiE8OiwN_JAhVK-2MKHYzcDVIQFggFMAA&client=internal-uds-cse&usg=AFQjCNHLjwoL2nnRGwDCxseYf0yr-OR8g).

<sup>78</sup> *Three Tribes to Exercise Jurisdiction Over Non-Indian Perpetrators Under VAWA*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/06/three-tribes-exercise-jurisdiction-over-non-indian-perpetrators-under-va-wa-153444>.

<sup>79</sup> See U.S. DEP'T OF JUSTICE, VAWA 2013 PILOT PROJECT, <HTTP://WWW.JUSTICE.GOV/TRIBAL/VAWA-2013-PILOT-PROJECT>.

<sup>80</sup> U.S. DEP'T OF JUSTICE, APPLICATION OF THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION FOR PERMISSION TO EXERCISE SDVCJ AUTHORITY PRIOR TO MARCH OF 2015, 5 (Dec. 6, 2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-va-wa.pdf>.

years of experience either adjudicating or prosecuting criminal cases in tribal or state court.<sup>81</sup>

Like the Umatilla Tribes, the Pascua Yaqui Tribe answered the question regarding the provision of a licensed, law trained judge by reference to 3 PYTC section 2-2-313 which also mirrors the language of 25 U.S.C. § 1303(c)(3).<sup>82</sup> The only tribal judge listed by the Pascua Yaqui Tribe in its application was Judge Mel Stoof, who is admitted to practice in the State of Texas, several U.S. District Courts, the 5th Circuit Court of Appeals, and several tribal courts in the Southwest United States.<sup>83</sup>

The Tulalip Tribes have taken a particularly thoughtful approach to preparing themselves to undertake the jurisdiction established under TLOA and VAWA 2013. Tulalip Tribal Code Chapter 2.05 Tribal Court, section 2.05.040 sets forth the qualifications of Tulalip tribal court judges generally:

(1) Eligibility. To be eligible to serve as a Judge of the Tribal Court, a person must:

(a) Be over 25 years of age;

(b) Never have been convicted or found guilty of a felony in any Federal or State Court or of a Class E offense under Tulalip Tribal law;

(c) Within the previous five years, not have been convicted of a misdemeanor in any Tribal, Federal, or State Court;

(d) Be of high moral character and never have been convicted of any offense involving moral turpitude;

(e) Be either a Judge from any Federally recognized Indian tribe, licensed to practice before the Washington State Bar Association, or any other qualified person appointed by the

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<sup>81</sup> *Id.*

<sup>82</sup> U.S. DEP'T OF JUSTICE, APPLICATION OF THE PASCUA YAQUI TRIBE VAWA PILOT PROJECT QUESTIONNAIRE ON TRIBAL CRIMINAL JURISDICTION, (Dec. 30, 2013), <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf>.

<sup>83</sup> *Id.*

Tribal Board of Directors, or possess a J.D. from an accredited law school; and

(f) Be a member in good standing of the Tulalip Bar.<sup>84</sup>

Section 6 of the Tulalip Code explicitly sets forth the qualifications of Tulalip judges who are authorized to preside over felony crimes: “To be eligible to preside over all stages of a felony criminal case, the Judge must: (a) have sufficient legal training to preside over criminal proceedings; and (b) be licensed as an attorney in the State of Washington or other state.”<sup>85</sup> In support of its assertion that the Tulalip Tribes has in place judges meeting the qualifications of Section 6 and 25 U.S.C. § 1303(c)(3), the Tulalip Tribes provided a link to a page on the tribal website where the biography of the current tribal court judge, Chief Judge Ronald J. Whitener, is posted.<sup>86</sup> In addition, the Tulalip Tribes included with their application a copy of the Tulalip Tribes Domestic Violence Court Rules. Rule 6.41(H)(ix) establishes the procedure by which judges who are found to meet the qualifications to preside in the Special Domestic Violence Court are chosen: “The Chief Judge shall designate and assign Judges to the Special Domestic Violence Court every January by standing order and the standing order and qualifications of the Judge will become part of the trial record.”

Although all three applicant tribes statutorily mandate that the tribal judges presiding over criminal cases possess TLOA and SDVCJ’s judicial requirements, they did not elaborate on what “sufficient legal training” the current judges underwent to preside over criminal proceedings. It is doubtful that a reviewing federal court in a *habeas* proceeding would be satisfied with such a cursory demonstration of the training undertaken to preside over criminal court proceedings. Thus, it is imperative that tribal court

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<sup>84</sup> TULALIP TRIBAL CODES § 2.05.040 (2015), <http://www.codepublishing.com/WA/Tulalip/html/Tulalip02/Tulalip0205.html#2.05.040>.

<sup>85</sup> *Id.* § 2.05.040(6).

<sup>86</sup> Chief Judge Ronald J. Whitener, TULALIP TRIBAL COURT, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/JudgesDirectorBio.aspx>. (last visited Dec. 31, 2015).

criminal judges make specific findings in court record with regard to both their licensure and their training.

It may be helpful to look at another situation in which the qualifications of a legal professional, over and above licensure and bar admission, are scrutinized. In order to serve as counsel in a class action, an attorney must file a motion for appointment under Federal Rule of Civil Procedure 23(g). In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class . . . .<sup>87</sup>

There is no requirement that potential class counsel demonstrate that he or she has undergone specific legal training in the handling of class actions. Rather, the movant's actual experience in handling class actions and knowledge of the governing law is the relevant consideration. In similar fashion, when seeking to demonstrate that a tribal court judge has sufficient training, providing a record of the number of prior criminal matters that the judge has handled may be critical to overcome a *habeas* challenge to a tribal court conviction based upon an inadequately trained judge.

The U.S. Senate Committee on the Judiciary in its report, which became VAWA 2013, explained that section 904,

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<sup>87</sup> FED. R. CIV. P. 23(g).

acknowledging inherent power of tribes to exercise SDVCJ, “builds on the groundwork laid by Congress in passing the Tribal Law and Order Act. [TLOA] is based on the premise that tribal nations with *sufficient resources* and authority will be best able to address violence in their own communities . . . .”<sup>88</sup> The exercise of jurisdiction costs money. It’s notable that all three Pilot Project tribes operate casino resorts, and thus have access to financial resources that many other tribes lack, which facilitated their ability to fund the exercise of VAWA’s SDVCJ.<sup>89</sup>

How would a criminal defendant raise the issue that the presiding tribal court judge is unqualified? Most complaints about the qualifications and skill of a judge in state courts are handled through the disciplinary or political processes. An unhappy litigant may appeal a ruling but the arguments made on appeal are that the judge either misinterpreted or misapplied the law. The complaints are not directed personally to the judge’s qualifications to preside over the trial itself. How would a criminal defendant in tribal court raise the issue of the tribal judge’s lack of qualifications, particularly the lack of sufficient training? A common way to remove a judge is to move for the judge’s removal on disqualification grounds. Canon 2 of the American Bar Association’s Model Code of Judicial Conduct (“Model Rule”) states that, “[a] judge shall perform the duties of judicial office, impartially, competently, and diligently.”<sup>90</sup> Model Rule 2.5(A) reiterates, “[a] judge shall perform judicial and administrative duties, *competently* and diligently.”<sup>91</sup> Model Rule 2.11 which relates to “disqualification” provides, in relevant part: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . . .”<sup>92</sup> If the judge does not recuse himself or herself on his or her own, one of the parties may file a motion to disqualify the judge and have the

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<sup>88</sup> SEN. REP. NO. 112-153, at 9 (2012).

<sup>89</sup> *Gaming Compacts*, U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm> (last visited Dec. 23, 2015).

<sup>90</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2011).

<sup>91</sup> *Id.* at 2.5(A) (emphasis added).

<sup>92</sup> *Id.* at 2.11.

motion and/or the case transferred to a disinterested judge.<sup>93</sup> The disqualification provisions of Model Rule 2.11 focus on challenges to the judge's impartiality. Although the Model Rules require a judge to perform competently, they do not seem to contemplate motions to disqualify based on incompetence, lack of training, or lack of experience. Nonetheless, a motion to recuse is one way in which a defendant may challenge the tribal court judge's qualifications to hear the case.<sup>94</sup>

Another possible way to challenge a presiding tribal court judge's qualifications in a criminal case is by a motion to dismiss for lack of subject matter jurisdiction.<sup>95</sup> Under 25 U.S.C. § 1302(b), if the defendant is subject to being imprisoned for a total term of more than one year, the tribe is required to utilize a licensed judge with sufficient training to preside over criminal proceedings.<sup>96</sup> In such a case, a defendant may argue that the judge lacked sufficient training, and, therefore, a key element of subject-matter jurisdiction was lacking. Or, in the alternative, that the "unqualified" judge can still hear the case, but simply cannot impose a sentence in excess of one year.

The argument that the lack of a qualified presiding judge divests the court of subject matter jurisdiction may be made with greater force in cases that fall under ICRA's provisions governing the exercise of SDVCJ. Section 1304(d) states that in a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide, *inter alia*, "all applicable rights under the Act"; which includes the right to a presiding judge who meets the qualifications under 25 U.S.C § 1302(c)(3). Thus it can be argued that a licensed, trained tribal court judge is a prerequisite to the exercise of SDVCJ.

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<sup>93</sup> Leslie Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 545 (1994).

<sup>94</sup> Cf. *Johnson v. Tracy*, No. CV-11001979-PHX-DGC, 2012 WL 4478801, at \*3 (D. Ariz. Sept. 28, 2012). One of the grounds for the tribal court defendant's petition for a writ of *habeas corpus* is that he was denied the procedural protections of 25 U.S.C. § 1302(c). *Id.* In granting the petition, the federal district court did note that the judge at the trial was not licensed to practice law. *Id.* The order does not reveal whether or how the defendant raised the judge's lack of qualifications at the trial level. *Id.*

<sup>95</sup> See FED. R. CIV. P. 12(b)(1).

<sup>96</sup> 25 U.S.C. § 1302(b) (2010).



### III. STEPS FOR SATISFYING ICRA'S TRIBAL JUDICIAL REQUIREMENTS

There are number of steps that tribes and tribal courts can take to ensure that the judges presiding over criminal proceedings meet the requirements of 25 U.S.C. § 1302(b) and 1304(d). First, action should be taken by the tribal legislature and the government agency with budgeting authority. Tribal code provisions should require that the only persons eligible to be a tribal court judge in criminal cases governed by TLOA and SDVCJ must be licensed and trained. Sufficient federal funding should be provided to the tribal court to secure licensed judges and ensure that they receive training in criminal law and procedure.<sup>97</sup> If a tribe has the means to do so, tribal judicial training should be high on the list of priorities for allocation of tribal funds. Second, the tribal court itself could establish by court rule that only judges who are licensed and trained may be assigned to hear TLOA and SDVCJ matters. In a manner similar to the Tulalip Tribal Court, a separate court docket could be established in which the federally mandated Due Process protections are provided.<sup>98</sup> Each presiding judge should have a continually updated resume or biographical statement that recites the judge's educational background, licensure, formal criminal training (including law school classes and other trainings through the National Judicial College or other judicial educational organizations), and the number of criminal trials and/or appeals adjudicated.

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<sup>97</sup> In 1998, Attorney General Janet Reno stated in testimony before the Senate Indian Affairs Committee, that it is "crucial" to provide additional funding to "better enable Indian tribal courts, historically under-funded and under-staffed, to meet the demands of burgeoning case loads." Attorney General Reno acknowledged that, "With adequate resources and training, [tribal courts] are most capable of crime prevention and peacekeeping." It is her view that "fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian Country, but enhancement of tribal justice systems as well." See *Department of Justice/Department of the Interior Tribal Justice Initiatives: Hearing Before the S. Comm. on Indian Affairs, 105th Cong. 55 (1998)* (statement of Janet Reno, Att'y Gen. of the United States).

<sup>98</sup> TULALIP TRIBAL CODES § 4.25.040 (2015), <http://www.codepublishing.com/wa/Tulalip/?Tulalip04/Tulalip0425.html#4.25.040>.

Third, procedures should be put in place so that the trial record reflects the defendant's right to have the case heard by a licensed and trained judge. The advisement of rights at arraignment should articulate both orally and in writing the due process protections required by TLOA and VAWA. As part of the advisement, the presiding judge should recite his or her qualifications.<sup>99</sup> The defendant should also be provided with a copy of the judge's resume or biographical paragraph. If feasible, the tribal prosecutor should try to reach a stipulation with defense counsel that the presiding judge is licensed and qualified. Bench rulings and written judgments of conviction should include a finding that reiterates that the presiding judge is licensed and sufficiently trained in the conduct of criminal proceedings.

Although Congress declined to require that tribal court judges exercising the expanded jurisdiction under TLOA and VAWA 2013 be law school graduates, it did express the understanding that "tribal court judges presiding over the case must be licensed and *law trained*."<sup>100</sup> In 1968, ICRA were enacted because the U.S. Constitution does not govern tribes, and thus neither tribes nor tribal justice systems are required to follow the Bill of Rights.<sup>101</sup> Ironically, 25 U.S.C. § 1302 is titled "Constitutional Rights of Indians." After the amendments effectuated by TLOA and VAWA 2013, ICRA now includes language that tribes must provide criminal defendants with protections "equal to that guaranteed by the United States Constitution"<sup>102</sup> and "all other rights whose protection is necessary under the Constitution of the United States."<sup>103</sup> Consequently, the conclusion can be drawn that tribal judges presiding over matters governed by TLOA and VAWA

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<sup>99</sup> In many tribal cultures humility is an aspirational virtue. A judicial recitation of accomplishments may be perceived as bragging and might be uncomfortable.

<sup>100</sup> S. REP. NO. 111-93, at 24 (2009) (emphasis added).

<sup>101</sup> See *Santa Clara v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority . . . this Court [has] held that the Fifth Amendment d[oes] not 'operat[e] upon' 'the powers of local self-government enjoyed' by the tribes. In ensuing years, the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.").

<sup>102</sup> 25 U.S.C. § 1302(c)(1) (2010).

<sup>103</sup> 25 U.S.C. § 1304(d)(4) (2010).

2013 must be trained in the Due Process protections as conferred under the U.S. Constitution and construed in case law.

There are almost no formal qualifications for federal judges.<sup>104</sup> The U.S. Constitution does not even mandate that Justices of the Supreme Court be law school graduates.<sup>105</sup> Nonetheless, there is an informal requirement that both federal and state judges be law school graduates.<sup>106</sup> Federal judges who are hearing *habeas* petitions from tribal court detention orders will be looking through the lens of a law school graduate and may conclude that a tribal judge who has not attended an ABA accredited law school is not “sufficiently trained.” Does this mean that all state and federal judges who are law school graduates are fully equipped by their educations to preside over criminal proceedings? The American Bar Association’s Revised Standards for Accreditation of Law Schools (“Standards”) does not require accredited law schools to follow a particular curriculum.<sup>107</sup> Rather the Standards provide general direction including what the objectives of a program of legal education must be: “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and

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<sup>104</sup> Magistrate and bankruptcy judges are required by statute to be lawyers, but there is no such requirement for district judges, circuit judges, or Supreme Court justices. 28 U.S.C. § 361(b)(1) provides that, “[n]o individual may be appointed or reappointed to serve as a magistrate judge under this chapter unless: (1) He has been for at least five years a member in good standing of the bar of the highest court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, except that an individual who does not meet the bar membership requirements of this paragraph may be appointed and serve as a part-time magistrate judge if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a specific location.”

<sup>105</sup> U.S. CONST. art. 3, § 1 (sole constitutional requirement for federal judges and justices to hold office is “good Behaviour”).

<sup>106</sup> Only forty-seven (47) of 112 U.S. Supreme Court Justices have had no formal law school training. *See*, HENRY JULIAN ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 49 (5th ed. 2007).

<sup>107</sup> *Revised Standards for Approval of Law Schools*, A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS (August 2014), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201406\\_revised\\_standards\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf).

responsible participation as members of the legal profession.”<sup>108</sup> Most law schools, however, have their own mandatory curriculum for the first year. An ABA study of law school curricula documented that 86.9 percent of accredited law schools required full-time students to take a course in Criminal Law in their first year.<sup>109</sup> Only 11 percent required first year students to take a Criminal Procedure course.<sup>110</sup>

In state and federal systems, many judges hearing criminal cases may have only had one formal criminal law course. Despite this lack of formal training, experienced criminal law attorneys are frequently appointed to the bench. It would be advisable that non-law school graduate tribal court judges designated to preside in criminal proceedings governed by 25 U.S.C. § 1302(c) and/or § 1304 undergo criminal law training equivalent to at least what a first year law student receives. It is important, however, for the tribal judge to also keep a record of his or her criminal law experience as an advocate, attorney, or judge. This on-the-job training can be used to support a finding that the presiding judge has sufficient legal training. Given that under SDVCJ, tribal judges will be hearing prosecutions involving allegations that the defendant committed domestic violence, dating violence, or violated a protection order in the tribe’s territory, it is important that tribal judges presiding in these cases also receive training in the dynamics of this kind of violence, understand perpetrator behavior, and how to meet victim/survivor needs.<sup>111</sup> It is essential

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<sup>108</sup> *Id.* at Standard 301(a).

<sup>109</sup> *A Survey of Law School Curricula*, A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS 25 (2004).

<sup>110</sup> *Id.* at 27.

<sup>111</sup> 25 U.S.C. § 1304(a)(2) (2010) (Domestic Violence):

[M]eans violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic or family violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

25 U.S.C. § 1304(a)(1) (2010) (Dating Violence):

that tribal judges be given the tools to comply with Anglo notions of due process while also meeting their own tribal criminal justice goals (*e.g.*, offender accountability, restorative justice, etc.).

Unfortunately, outside of the law school setting there are few opportunities for non-attorney judges to access criminal law and procedure training. A review of the courses offered by the National Judicial College for 2015 reveals that there are a few that may provide, in part at least, some of the training that a reviewing federal judge would find sufficient: Essential Skills for Tribal Court Judges; Advanced Tribal Bench Skills: Competence, Confidence, and Control; Special Court Jurisdiction; and Advanced Special Court Jurisdiction.<sup>112</sup> The Special Court Jurisdiction courses are not tribal court specific, but tribal judges may attend. Another course, “ICRA: Protecting Rights in Tribal Court” was offered in 2014 but was not offered in 2015. Each of these courses costs between \$995 (and conference fee of \$245) for

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[M]eans violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

25 U.S.C. §§ 1304(5) (2010) (Protection Order):

(A) means any injunction, restraining order or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and  
(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

<sup>112</sup> *Courses*, NATIONAL JUDICIAL COLLEGE, 2015, <http://www.judges.org/courses/> (last visited Dec. 15, 2015). However the Special Court Jurisdiction description states that “[t]his course is specifically designed for judges without law degrees who are recently appointed or elected special court judges. Judges will learn the basics of their judicial role, including small claims, traffic court, and *misdemeanors*.” *Special Court Jurisdiction*, NATIONAL JUDICIAL COLLEGE, <http://www.judges.org/special-court-jurisdiction-1607/> (last visited Dec. 15, 2015) (emphasis added). Tribal judges charged with exercising jurisdiction under TLOA, however, will also be handling felony cases.

a three day training and \$1,595 (plus a conference fee of \$495).<sup>113</sup> Some scholarships are made available but the vast majority of tribal judges must pay these fees out of pocket, plus the cost of their travel to Reno, Nevada, lodging, and meals.<sup>114</sup> There does not appear to be one single course or a series of courses that can assure that the tribal judge participant will be “sufficiently trained” to handle TLOA and VAWA criminal cases. Given the fact that VAWA 2013’s tribal jurisdictional provisions became effective for all tribes in March 2015, it is urgent that training be developed to meet this need without delay. It is imperative that tribal judges who are familiar with U.S. Constitution-based Due Process protections and the need to adhere to tribal values, such as restorative justice principles, traditions, and customs deliver the training. Ideally there should be a certificate that a tribal court judge can earn that will provide *prima facie* evidence of “sufficient legal training” to preside over criminal matters governed by 25 U.S.C. §§ 1302(c) and 1304. Having retired federal judges provide advice on the development of the course curriculum may bolster acceptance of the certificate by the federal courts. The training should be available year-round, not just offered on an *ad hoc* basis. Online courses and webinars, available to even the most remote tribes should be created. Given the practical outlook of many American Indians and Alaska Natives, it is also important to incorporate experiential learning methods. Santa Clara Pueblo member Professor Gregory A. Cajeta observed that “many Indians have less difficulty comprehending educational materials and approaches that are concrete or experiential rather than abstract and theoretical. Given this characteristic, learning and teaching should begin with numerous concrete examples and activities to be followed by discussion of the abstraction.”<sup>115</sup> Finally, ongoing continuing judicial education should be developed and readily available to keep tribal court judges current.

Now that the need for judicial education has been established, the question arises: How will tribes pay for training? As discussed

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Gregory A. Cajeta, *The Native American Learner and Bicultural Science Education*, in NEXT STEPS: RESEARCH AND PRACTICE TO ADVANCE INDIAN EDUCATION 135, 142 (Karen Gayton Swisher & John Tippeconnic eds., 1999).

earlier, tribal courts are and have been historically underfunded. Most tribal courts are supported with a combination of sources: Bureau of Indian Affairs funding, grants from the Department of Justice or other government agency, and tribal funds. The Bureau of Indian Affairs Tribal Justice Support Directorate describes its mission as follows:

Tribal Justice Support provides funding guidance, technical support, and advisory services to tribal courts and the Courts of Indian Offenses. This includes providing funding to tribal courts, training directed to specific needs of tribal court personnel, promoting cooperation and coordination among tribal justice systems and Federal and state judiciary systems, and providing oversight for the continuing operations for the Courts of Indian Offenses.<sup>116</sup>

The Office of Tribal Justice Support did offer some trial advocacy training in 2013 and 2014, but no future planned trainings are listed on their website.<sup>117</sup> TLOA established the Indian Law Enforcement Foundation (“Foundation”) whose duties include: “assist[ing] the Office of Justice Services of the Bureau of Indian Affairs and Indian tribal governments in funding and conducting activities and providing education to advance and support the provision of public safety and justice services in American Indian and Alaska Native communities.”<sup>118</sup> The Secretary of the Interior should have established the Foundation no later than January 20, 2011, however, to this date, there is no evidence that the Foundation exists.<sup>119</sup>

Under the U.S. Department of Justice Coordinated Tribal Assistance Solicitation (CTAS), federally recognized tribes and tribal consortia may apply for funding to improve public safety and victim services in tribal communities.<sup>120</sup> Applications may be filed

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<sup>116</sup> BUREAU OF INDIAN AFFAIRS, OFFICE OF JUSTICE SERVICES, TRIBAL JUSTICE SUPPORT DIRECTORATE, <http://www.bia.gov/cs/groups/xojs/documents/text/idc-041108.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> 25 U.S.C. § 458ccc-1(d)(2) (2010).

<sup>119</sup> *Id.* (a)(1).

<sup>120</sup> U.S. DEP’T OF JUSTICE, OMB NO. 1121-0329, COORDINATED TRIBAL ASSISTANCE SOLICITATION: FISCAL YEAR 2015 COMPETITIVE GRANT

under five different Purpose Areas.<sup>121</sup> Under Purpose Area 3, Justice Systems and Alcohol and Substance Abuse, and Purpose Area 5, Violence Against Women Tribal Governments Program, a tribe may use funding “[t]o implement enhanced authorities and provisions under the Tribal Law and Order Act and the Violence Against Women Reauthorization Act of 2013.”<sup>122</sup> It appears that training a tribal judge to preside over criminal proceedings would fall under this provision. However, tribal judicial education providers are not eligible to receive this funding directly to develop and deliver the training.

The U.S. Department of Justice Office of Violence Against Women Grants to Support Families in the Justice System program (“Justice for Families Program”) was authorized by VAWA 2013.<sup>123</sup> The intent of the Justice for Families Program is to improve the response of all aspects of the civil and criminal justice system to families with a history of domestic violence, dating violence, sexual assault, and stalking, or cases of child sexual abuse allegations.<sup>124</sup> Among the eligible applicants are Indian tribal governments, tribal courts and non-profit organizations providing tribal judicial education. Under Purpose Area 3 “Training for court-based and court-related personnel” funding is available to:

Educate court-based and court-related personnel and court-appointed personnel (including custody evaluators and guardians ad litem) and child protective services workers on the dynamics of domestic violence, dating violence, sexual assault, and stalking, including information on perpetrator behavior, evidence-based risk factors for domestic

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ANNOUNCEMENT (2015), [http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/11/19/ctas\\_fy-2015\\_solicitation.pdf](http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/11/19/ctas_fy-2015_solicitation.pdf). The application deadline was February 24, 2015.

<sup>121</sup> *Id.* at i.

<sup>122</sup> *Id.* at 19, 23.

<sup>123</sup> OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, OMB NO. 1122-0020, OVW FISCAL YEAR 2015 JUSTICE FOR FAMILIES PROGRAM SOLICITATION 5 (2015),

<http://www.justice.gov/sites/default/files/ovw/pages/attachments/2014/12/31/fy-2015-justice-for-families-solicitation.pdf>. Deadline application was February 14, 2015.

<sup>124</sup> *Id.*



and dating violence homicide, and on issues relating to the needs of victims, including safety, security, privacy, and confidentiality, including cases in which the victim proceeds pro se.<sup>125</sup>

The Justice for Families Program funds can be used to develop and deliver training to tribal court judges that will improve their competence in handling SDVCJ cases beyond merely developing an understanding of criminal law and procedure.

Section 402 of TLOA reauthorized the Tribal Justice Act, and Indian Tribal Justice Technical and Legal Assistance Act of 2001.<sup>126</sup> These Acts authorize funding for tribal court judges, court personnel, public defenders, court facilities, and the development of records managements systems and other needs of tribal court systems.<sup>127</sup> The Tribal Justice Act, originally enacted December 1993, authorized the appropriation of \$58.4 million in tribal court base funding.<sup>128</sup> Yet, not a single dollar under the Tribal Justice Act has been appropriated in the twenty-two years since its passage.<sup>129</sup> Of particular note is the provision of the Tribal Justice Act that states that federal funds may be used specifically for “training programs and continuing education for tribal judicial personnel.”<sup>130</sup> The reauthorization of these Acts, which could provide much-needed funds to support tribal court base operations and enhancements, are set to expire in 2015. Appropriations should finally be made to fulfill the promise of these Acts.

## CONCLUSION

Tribes fought hard for the passage of TLOA and Title IX of VAWA. Not all tribes may choose to avail themselves of the enhanced sentencing authority or SDVCJ. Many tribes believe that the imposition of federal standards of Due Process infringes on tribal sovereignty and self-determination. There is resistance to

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<sup>125</sup> *Id.* at 6.

<sup>126</sup> Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, § 242 (codified as amended in scattered sections of 25 U.S.C.).

<sup>127</sup> *Id.*

<sup>128</sup> *Tribal Justice Act: Hearing on P.L.103-176 Before the S. Comm. on Indian Affairs*, 104th Cong. (1995).

<sup>129</sup> Shapiro, *supra* note 15.

<sup>130</sup> 25 U.S.C. § 3613(b)(3).

being told who may and may not serve as a tribal judge in criminal proceedings. However, the judicial qualification provisions were one of the compromises that were reached in order for tribal jurisdiction to be restored. Other tribes may not implement TLOA or SDVCJ because they lack the funding to hire licensed judges or to train their existing judges. Congress adopted a flexible standard when it came to the licensure of tribal court judges. This standard accommodates a tribe's culturally responsive decision to authorize non-law school graduates to serve as tribal court judges. The requirement that a tribal court judge have "sufficient legal training to preside over criminal proceedings" is less straightforward. Realizing that tribal court convictions will be increasingly subject to federal court review through *habeas corpus* proceedings, tribes should endeavor to develop judicial standards and training that will pass muster with a federal judge. Hopefully, it will be the tribal court judges themselves who take the lead to develop and provide the training that comports with federal expectations—while still ensuring fidelity to indigenous tribal justice beliefs and practices.